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January 25, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RECEIVED
JAN 25 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 92-265

Dear Ms. Searcy:

Enclosed please find an original and nine copies of comments which we are filing on behalf of our client, CableAmerica Corp. in the proceeding identified above.

We are also enclosing an additional copy and ask that you stamp it as having been received by your office and return it to us as proof of filing.

If you have any questions, please feel free to call me at the above number.

Sincerely,

Thomas B. Smith

TBS/chh:COMPLAINT.CA

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

COMMENTS OF CABLEAMERICA CORPORATION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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Counsel for CableAmerica Corporation

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF CABLEAMERICA CORPORATION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

CableAmerica Corporation ("CableAmerica") submits these comments in response to the Notice of Propose Rulemaking adopted December 10, 1992, and released December 24, 1992 ("Notice"). That Notice was issued pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act" or "Act").

I. Introduction

The program access provisions of section 628 of the Communications Act of 1934, which were added by section 19 of the Cable Act, are an extraordinarily important part of the congressional mandate for competition in the cable marketplace. CableAmerica has learned in that marketplace that control over programming is a powerful weapon that can be wielded with great effectiveness against competitors. Through the rules adopted in this proceeding, the Commission must enforce the congressional intent that vertically integrated programming vendors not use that weapon unfairly or anti-competitively.

II. Background

CableAmerica is a multichannel video programming distributor that owns and operates cable television systems in several United States markets. CableAmerica was founded in 1983, and it presently provides cable service to approximately 54,000 customers in Alabama, Arizona, California, Michigan, and Missouri.

Since its founding, CableAmerica has played a relatively unusual role in the cable industry: it has entered several markets already served by other cable operators by building new systems to compete head-to-head for customers. As the Commission knows, such competition between cable systems is relatively rare in this country, and there are very few markets in which cable operators have done what CableAmerica has done: compete effectively with other cable systems.[1] Today CableAmerica operates competitive systems in Mesa, Arizona and Huntsville, Alabama. At one time CableAmerica operated competitive systems in Tennessee and California as well.

Being an effective competitor, however, is not easy. In most of the markets that CableAmerica has entered on a competitive basis, the incumbent operators have been much larger

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[1] See Report in MM Docket No. 89-600, at 52 (July 31, 1990) (FCC is informed of only 40-49 directly competitive cable systems across the nation).

multiple system operators ("MSOs"). In many cases they have been affiliated with satellite programming vendors. In all cases they have been very unhappy about CableAmerica's decision to compete with their systems. And these operators have not hesitated to demonstrate their displeasure by taking action designed to force CableAmerica out of their markets.

In each of the markets it has entered as the second cable operator, CableAmerica has faced some form of anti-competitive behavior by an entrenched competitor, or discriminatory treatment by a vertically integrated program supplier. For example, CableAmerica was subjected to four years of deep-discount pricing by a large MSO competitor in one community; that competitor had the ability to subsidize its local operations with revenue drawn from its many systems in monopoly markets. CableAmerica also has seen some direct competitors awarded exclusive contracts for key programming services. And it has seen competitors provided key programming at a lower cost or on better terms than those offered to CableAmerica.

In the sections that follow, we offer a sample of the anti-competitive practices employed against CableAmerica in the communities where it now operates competitive cable systems -- Mesa, Arizona and Huntsville, Alabama. We relate these experiences in some detail because they provide important context for our comments, and also provide insight for the FCC into how cable competitors can be disadvantaged when the major vertically integrated programming vendors unfairly favor larger MSOs.

1. Times Mirror Denies CableAmerica Access To Local Sports Programming Necessary To Compete In Mesa

In Mesa, Arizona, CableAmerica competes with another cable operator, Dimension Cable. Dimension Cable in Phoenix is the fifth largest cable operator in the country, with about 375,000 customers. In Mesa, Dimension Cable claims 40,000 to 50,000 customers. CableAmerica entered the Mesa market in 1988, and now has approximately 8,000 customers.

Dimension Cable is owned by the Times Mirror Cable Television Company ("Times Mirror"), which also is a satellite cable programming vendor that owns the Arizona Sports Programming Network ("ASPN"). ASPN carries sporting events involving teams located in Arizona or otherwise of interest to Arizona residents. ASPN features professional basketball games played by the Phoenix Suns of the National Basketball Association ("NBA").

Phoenix Suns games are enormously popular in Arizona, especially in the Phoenix metropolitan area (which includes Mesa). A local broadcast station carries thirty Suns games over the air to local residents, and CableAmerica carries this channel on its Mesa system. ASPN, however, has exclusive rights to an additional twenty Suns games. Those exclusive rights extend through the 1992-1993 and 1993-1994 NBA seasons.

Times Mirror makes the ASPN programming service available to its own cable system in Mesa, Dimension Cable. Times Mirror also sells ASPN to TCI of Scottsdale, a cable system operating in a nearby community that faces no competition from Dimension Cable or any other operator, and that is owned by the nation's largest MSO. Yet Times Mirror has refused to sell the ASPN service to CableAmerica, Dimension's competitor in Mesa. Vertical integration thus allows Times Mirror to discriminate against CableAmerica and enhance the competitive position of its own cable system.

Because there is no justification for Times Mirror's refusal to sell ASPN to CableAmerica in Mesa, CableAmerica is today filing a complaint with the Commission challenging that refusal. (See Exhibit A hereto.)

As that complaint makes clear, Times Mirror's refusal to sell ASPN has damaged CableAmerica in Mesa. For example, during the early months of the current NBA season, CableAmerica built into the Dobson Ranch subdivision of Mesa, an area also served by Dimension Cable. Of thirty-seven potential customers in that neighborhood who declined to subscribe to CableAmerica, fifteen -- or forty percent -- gave as their reason the unavailability of ASPN on the CableAmerica system. In addition, many CableAmerica customers in Mesa have expressed frustration that they cannot see the Phoenix Suns games carried on ASPN.

Times Mirror's illegal discrimination directly impedes CableAmerica's ability to attract new customers, and makes current customers less satisfied with CableAmerica. Combined, these results translate into decreased revenue, less efficient operations, restricted access to financing, and reduced ability to provide quality programming and service.

2. HBO's Discriminatory Prices In Mesa And Huntsville

CableAmerica operates its Huntsville, Alabama cable system through its subsidiary, Cable Alabama. Cable Alabama entered Huntsville in 1986, expanding from neighboring suburban jurisdictions. Cable Alabama now has about 12,000 customers in Huntsville, and about the same number in the nearby areas. The Huntsville system competes directly with a system owned and operated by Comcast Corporation. Comcast has over 40,000 customers in Huntsville, and over 2.5 million customers across the country.

In response to Cable Alabama's entry into Huntsville, Comcast conducted a prolonged price war during which it charged only $5 per month for basic cable service. This remarkable price remained in effect for years. In 1990, Cable Alabama filed a complaint in federal court alleging predatory pricing in the Huntsville market. That case was settled within six months, and pricing in Huntsville has since returned to more realistic levels.

CableAmerica's burdens in Huntsville have not been solely the result of pricing by a horizontal competitor fifty times its size. Instead, in Huntsville -- and in Mesa as well -- CableAmerica has confronted discriminatory pricing by vertically integrated satellite cable programming suppliers.

In both markets, the CableAmerica systems and their competitors offer Home Box Office ("HBO") to their customers as a "premium" service. HBO is owned by Time Warner, Inc., which also owns numerous cable systems nationwide.[2] CableAmerica, however, pays more for HBO than Comcast pays in Huntsville, or Dimension Cable pays in Mesa. The reason for the disparity is that Time Warner provides volume discounts of up to twenty percent for cable operators with 100,000 HBO customers.

For example, if the aggregate number of HBO customers served by a cable operator -- in all markets -- is between 20,000 and 35,000, the cable operator is eligible for a 5% discount in total HBO charges. If the aggregate number of customers is between 35,000 and 50,000, a discount of 10% is available. Between 50,000 and 75,000, a 15% discount applies, and between 75,000 and 100,000 the discount is 17.5%.[3]

Because CableAmerica has fewer than 20,000 HBO customers in the aggregate, it is not eligible for any HBO discounts, anywhere. But its larger competitors, with many more customers nationwide, are entitled to substantial HBO discounts, which translate into a substantial competitive advantage over CableAmerica.

For example, for many months the incumbent cable operator in Huntsville charged customers $5.00 per month for HBO, at a time when Cable Alabama paid HBO $5.45 per month per customer. Cable Alabama could not meet its competitor's price, which presumably

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[2] _See_ S. Rep. No. 92, 102d Cong., 1st Sess., 24-26 (1991).

[3] Letter to CableAmerica from Robert S. Grassi, Senior Vice President, Affiliate Relations (June 23, 1992) (describing HBO rate increase and volume discount plan). (_See_ Exhibit B.)

was based on HBO's 20% volume discount, since the incumbent operator had millions of customers nationwide.[4] At the price charged by the incumbent for HBO, Cable Alabama would have lost 45 cents per month per HBO customer on programming costs alone, without even considering its other costs.[5]

As a result of such volume discounts -- which are by no means limited to HBO -- CableAmerica is forced to either charge customers more or absorb these greater subscription costs itself. In either event, CableAmerica's operating efficiencies are reduced and its competitive position injured.[6] As with the exclusive programming contract in Mesa, this discriminatory treatment lacks any legitimate basis.

3. Vendor Discrimination Hinders <u>Competition In The Cable Marketplace</u>

These discriminatory practices are but a sample from the full range of anti-competitive pressures applied to CableAmerica in Mesa and Huntsville through the years. Yet, based on these two practices alone, CableAmerica today operates at a significant competitive disadvantage in both markets. The programming it can

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[4] That discount, applied to the $5.45 charge to CableAmerica, would reduce Comcast's price for HBO to $4.36.

[5] Oddly enough, it would have been cheaper for CableAmerica to buy HBO from its competitor than from HBO itself.

[6] As a result of the Time Warner price discrimination for HBO, CableAmerica must pay more for the HBO service in all of its markets, not just in Huntsville and Mesa. In those two markets, however, CableAmerica competes directly with cable operators that enjoy the benefits of Time Warner's price discrimination. Thus in those two markets CableAmerica sustains the greatest damage to its operating efficiency and its ability to compete.

offer local residents is restricted, its operating efficiency is reduced, and the financial resources available to it to improve service or expand capacity are either diminished or diverted to vertically integrated programming vendors.

It is precisely this sort of discrimination in the sale of cable programming services that Congress intended to make illegal when it adopted the Cable Act. As noted by the Act's key sponsors:

> This legislation addresses concerns raised by potential cable competitors that they cannot obtain access to programming. Small cable operators . . . and other potential distributors of video programming complain that they are denied programming or are charged more for programming than the large cable operators affiliated with cable programmers. . . . [T]his bill addresses the problem by barring programmers affiliated with cable operators from unreasonably refusing to deal with video distributors. Such programmers are also barred from discriminating in the price, terms, and conditions if that action would impede retail competition.[7]

> It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore." You have to offer your programs to other competitors, and you cannot refuse to deal by saying, "We will only give it to you at a much higher price." Prices need to be comparable and fair.[8]

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[7] 137 Cong. Rec. S582 (daily ed. Jan. 14, 1991) (Sen. Danforth). *See also* 137 Cong. Rec. S566 (daily ed. Jan. 29, 1991) (Sen. Metzenbaum) ("Multisystem cable operators control virtually all of the regional sports networks around the country. . . . And cable companies also control four of the five top pay movie services.").

[8] 138 Cong. Rec. H6534 (daily ed. July 23, 1992) (Rep. Tauzin).

To further the goals of the Act, the Commission must adopt rules that will ensure that CableAmerica -- and other operators willing to compete in cable markets around the country -- can operate without the burden of programming exclusivity, discriminatory pricing, and other unfair practices that they confront today.

III. Comments In Response To FCC Notice

In this section, CableAmerica responds to many of the questions raised by the Commission in its Notice of Proposed Rulemaking. These comments are presented according to the numbered paragraphs in that Notice, and we reserve the right to comment in our reply on additional questions addressed by other commenters.

As the comments below indicate, our major concern is that the Notice does not always remain faithful to the basic enforcement structure established by the Cable Act. In particular, at several points the Notice proposes to introduce unauthorized and unwarranted complexities into the Act's program access and anti-discrimination provisions. As set forth in the Act, the basic structure of those provisions is:

-- Under section 628(b), vertically integrated programmers may not engage in unfair competition or other unfair or deceptive acts or practices that either (i) "hinder significantly" a video distributor from providing programming to customer, <u>or</u> (ii) were undertaken with the purpose of doing so.

-- Under section 628(c)(2)(B), vertically integrated programmers may not discriminate in price, terms or conditions unless they can justify those differences based on "actual and reasonable" cost differences, or "direct and legitimate" benefits from the number of customers served by different distributors.

-- Under section 628(c)(2)(D), vertically integrated programmers may not use exclusive contracts unless (i) they are found to be in the public interest under the standards in Section 628(c)(4); or (ii) they were signed before June 1, 1990.

The Notice suggests a variety of standards, presumptions, and surrogate tests that would transform this clear statutory structure into a murky and ill-defined analytic exercise. The giant vertically integrated MSOs could manipulate that exercise to prolong enforcement proceedings indefinitely. As discussed below, we implore the Commission to adhere closely to the statute in its regulations.

Paragraph 8. CableAmerica agrees with the Notice that the focus of the Act is on vertically integrated cable operators with attributable interests in programming vendors. This focus is clear in the Conference Report,[9] and in the floor statements by

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[9] <u>See</u> S. Rep. No. 862, 102d Cong., 2d Sess., 91-92 (1992).

the key sponsors of the legislation, Sen. Danforth and Rep. Tauzin.[10]

CableAmerica strongly disagrees, however, with the implication in Paragraph 8 (and elsewhere in the Notice) that vertically integrated programmers may refuse to deal with or discriminate against unaffiliated cable operators if non-vertically integrated programmers engage in the same practices. Neither the language of the Act nor its legislative history supports that conclusion. Congress deplored these practices as an impediment to increased competition in the cable industry, but it chose to address them only insofar as they were perpetrated by vertically integrated concerns.

Congress concluded that vertical integration of programming vendors and cable systems increases the anti-competitive impact of refusals to deal and discriminatory treatment. That such practices may be employed by non-integrated programmers is entirely irrelevant to the legislative determination to bar their employment by integrated entities. Indeed, if the implication contained in Paragraph 8 were incorporated in the Commission's rules, Congress' intent to restrain the unique powers of the giant vertically integrated programmers would be totally undermined.

Paragraph 9. To serve the broad procompetitive goals of section 628, the attribution standard for identifying integration

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[10] <u>See</u> <u>supra</u> text at 9-10.

of programmers and video distributors must be similarly broad. That attribution standard must identify ownership links between programmers and distributors that could create incentives for vendors to show preferential treatment to related distributors, or to distributors related to other programmers. The standard also must assure that all vertically integrated satellite cable programming vendors -- and not just those that are majority owned by cable operators -- are identified and brought within the Act. For both purposes, an attribution standard based on an identifiable and non-trivial ownership interest is required.

CableAmerica agrees with the suggestion in Paragraph 9 of a five percent ownership threshold. Yet CableAmerica does not believe the other provisions of the broadcast attribution rules need apply. Unlike the broadcast rules, the underlying purpose of which is to identify those persons with access to the limited broadcast spectrum, the goal of the cable attribution rules is merely to identify ownership relationships that could lead to preferential treatment and the unfair expansion of market power. For this reason, a single non-trivial ownership level of five percent will suffice.

Paragraph 10. CableAmerica disagrees with the premise stated in Paragraph 10 in three crucial respects. In fact, if the Commission promulgates its rules based on the premise as now stated in Paragraph 10, it may undercut much of the good the Cable Act was designed to accomplish.

First, Paragraph 10 makes the unqualified -- and flatly incorrect -- assertion that "section 628 is limited to conduct 'the purpose or effect [of which] . . . is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.' . . . [This criterion] is a critical threshold requirement under the statute."[11] There is no such threshold requirement for two major categories of violations of section 628: exclusive contracts and discriminatory practices.

Section 628(b) broadly states congressional intent to bar unfair or deceptive acts or practices by programming vendors when such acts or practices significantly hinder or prevent the distribution of video programming. To further this goal, Congress instructed the Commission to adopt regulations identifying the conduct proscribed by this provision. But Congress also established in Section 628(c) that, at a minimum, the regulations must prohibit discrimination in prices, terms, and conditions for the sale and delivery of programming services,[12] and they must ban exclusive contracts for programming services.[13]

For these two forms of unfair, anti-competitive conduct, no additional showing of "harm" to or "hindering" of distributors is required, at least as Paragraph 10 uses these terms. Congress

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11 Notice ¶ 10 (emphasis added).

12 § 628(c)(2)(B).

13 § 628(c)(2)(D).

concluded that these two forms of conduct by vertically integrated entities are, in and of themselves, intolerable unless specific statutory exceptions apply. Accordingly, Congress detailed the contents of the regulations prohibiting this conduct. Nowhere in those statutory provisions (sections 628(c)(2)(B) and (D)) did Congress state that price discrimination or contract exclusivity _is_ tolerable if a vendor engaging in these practices can show, as Paragraph 10 seemingly suggests, (i) that it does not discriminate against all video distributors in the market (and thus citizens can get the programming from another source), or (ii) that no operator has been put out of business by the practices, or (iii) that the discriminatory practices have only raised prices or cut into the profits of the disfavored operator.

To the contrary, Congress specifically enumerated the only limits on the prohibitions in sections 628(c)(2)(B) and (D). Discrimination in prices, terms, or conditions is not unlawful _if_ such activities are otherwise shown to be reasonable under subparagraphs (i) through (iv) of section 628(c)(2)(B). And exclusive programming contracts are not unlawful _if_ such contracts were executed before June 1, 1990, or are otherwise found to be in the public interest under section 628(c)(4). If these conditions are not met, however, proof of vendor discrimination or contract exclusivity alone warrants relief under section 628.[14]

The Commission would do serious violence to the statutory scheme if it were to create the proposed "harm threshold" requirement for exclusive contract or discrimination claims under sections 628(c)(2)(B) and (D). Instead of the streamlined administrative procedure contemplated by Congress, the result would be a bog of protracted, antitrust-type litigation over the impact on consumers, distributors and programmers of, for example, price discrimination. The giant integrated MSOs will always have the advantage of wealth in such a long struggle. But Congress steered the Commission around that bog, by barring such discrimination unless specific statutory justifications are present. We urge the Commission not to drive back into the bog on its own.

Second, Paragraph 10 never acknowledges that Congress in section 628(b) proscribed unfair or deceptive practices "the purpose or effect" of which is to hinder or prevent a cable operator from providing programming to customers.[15] Thus, a

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[14] See, e.g., S. Rep. No. 862, at 92-93 (section 628 regulations "must prohibit" vendor price discrimination, but vendor may take into account cost factors in setting prices; and regulations "must prohibit exclusive contracts . . . unless the FCC determines such a contract is in the public interest"); see also 138 Cong. Rec. H8676 (Sept. 17, 1992) (Rep. Harris) (Act prohibits vendor discrimination and contract exclusivity; "meaningful program access promotes competition in the video marketplace so that television viewers will have the opportunity to choose among competing cable companies . . . and any other new program distribution technology").

[15] § 628(b) (emphasis added).

section 628(b) complainant need show <u>either</u> that it was "harmed" (to use the Commission's word) <u>or</u> that the programming vendor's <u>purpose</u> was to hinder or prevent the complainant from providing programming to customers. A distributor may well be able to prove that the programming vendor pursued a particular course in order to diminish competition or make certain programming either unavailable to customers in a given community, or available on a restricted basis only. Congress wisely provided for a remedy for <u>attempts</u> to use these practices to injure competition; otherwise (and under the Notice's suggestion), the independent cable operator could only seek relief from the Commission under section 628(b) <u>after</u> an illegal practice had crippled its business.

<u>Third</u>, the Commission must not choke off remedies for those seeking relief under § 628(b) for practices that have an illegal "effect." The statute requires proof of programmer practices that either (i) prevent, or (ii) "hinder significantly" a distributor from providing that programming to customers. That is a very simple, straightforward standard, as befits a streamlined administrative procedure.

Yet Paragraph 10 and its notes propose to burden this straightforward process with questions that are entirely irrelevant to the statutory standard. Thus, Paragraph 10 speaks of the distributor having to prove significant harm to competition, or that the viability of a cable operator's service be threatened, before that operator may challenge a programmer's unfair practices.[16] Surely nothing in the Act or its legislative history suggests that a complaining cable operator must be on the verge of going out of business, or must show generalized injury to the cable marketplace, before it may pursue a claim under section 628(b). Imposing such standards will, again, transform the expedited administrative process intended by Congress into a glacial antitrust-type litigation.

The Commission cannot stray from the statutory language. There is no provision in the Act that supports the suggestion in note 27 that even if an operator is excluded from carrying certain programming by an integrated entity's practices, the operator may not bring a section 628(b) claim if that service is available through some other video distributor.[17] Nor is there any basis in the Act for allowing a programming vendor to justify its anti-competitive policies toward a cable operator by arguing that consumers are not "injured" because they can always get the programming from a favored distributor in the market.[18] In either situation, the vendor's anti-competitive practices have prevented, in Congress' words, "any multichannel video programming distributor from providing satellite cable programming . . . to subscribers."[19] Such practices are actionable under the section 628(b).

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16 <u>See</u> Notice ¶ 10 & n.26.

17 <u>See</u> Notice ¶ 10 & n.27.

18 <u>See</u> Notice ¶ 10.

19 § 628(b).

In short, Congress provided that if unfair practices prevent one programming distributor out of one hundred from providing certain programming to customers, those practices are illegal under section 628(b). If Congress had intended the violation of section 628 to turn on an overall competitive analysis of the video industry, it would have said so. But Congress said liability is created by practices that prevent or hinder the provision of programming to consumers. That standard must control.

Similarly, the Commission must not adopt an unduly restrictive view of the proof under section 628(b) that certain practices will "hinder significantly" a cable operator's ability to provide programming. A cable operator may be forced to accept discriminatory terms because it needs the programming at issue in order to remain competitive in a given market, or to protect its prior investments in advertising or customer relations, or to enhance prospects for franchise renewal. Whatever the reason, if that cable operator must pay an unfairly high price for, or accept some other unreasonable conditions on, that programming, the availability to customers is hindered significantly.

For example, if the cable operator charges its customers the discriminatory higher price for the programming, fewer customers will buy it, thereby significantly hindering delivery of the programming to consumers. If the cable operator does not pass along the extra costs imposed by the vendor, the cable operator will have to subsidize the viewers of that programming by reducing service in other ways, such as eliminating other programming, reducing customer service staff, expanding service more slowly or not at all, or even drawing from the revenue stream of a cable system in another community. These effects, while not directly implicating the availability of the programming at issue in the first community, significantly hinder the operator's ability to offer programming services to its customers. In effect, they constrict the operator and diminish the extent, level, and quality of service it can provide in one or more of the communities in which it operates. That violates section 628(b).[20]

Paragraph 11. The discussion in Paragraph 11 of geographic market definition for the measurement of "harm" is irrelevant to (i) discrimination covered by section 628(c)(2)(B), (ii) exclusive contracts barred by sections 628(c)(2)(D), and (iii) practices undertaken for an anti-competitive purpose. For any other claim under section 628, "harm" must be measured by whether the challenged practices hinder significantly or prevent a cable operator from offering programming to its customers.[21] There are no geographic limitations on this standard, and the Commission should not create any by regulation.

As discussed in response to Paragraph 10, the practices of a vertically integrated programmer may place a cable operator at a

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[20] See § 628(b).

[21] See supra comments at ¶ 10.

competitive disadvantage in one market, forcing that operator to draw resources from another market in order to remain competitive in the first market. That transfer, although benefitting the customers in the first market and preserving the programming available to them, may significantly hinder the operator from maintaining the same service for customers in the second market. Under the express language of section 628(b), adverse impact in the second market is completely sufficient to sustain a complaint against the programming vendor. The Commission has no basis for creating an artificial geographic component in the section 628 process.

Indeed, section 628(c) of the Cable Act also contains no geographic limitation. Price discrimination by a programmer is unlawful unless justified on the basis of the factors enumerated in section 628(c)(2)(B)(i)-(iv). So, for example, where a vendor charges different prices for a particular programming service in different markets, and that difference reflects only the different costs of providing that service in those markets, the price variance will be sustained. Where that variance is not grounded in different costs, it violates the Act.[22]

Finally, there is no basis under the Act for limiting section 628 to a programming vendor's actions in those specific markets in which the vendor actually operates a cable system.

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[22] See also § 628(c)(4) (public interest analysis for programming exclusivity involves analysis of effect of such exclusivity on "development of competition in local and national" cable markets).

Congress easily could have so limited section 628's ban on price discrimination or exclusive contracts by all programmers. It did not. Instead, Congress banned certain cable industry participants (vertically integrated satellite cable programming vendors) from engaging in those practices anywhere. Nowhere in the Act did Congress suggest that those programmers have a license to gouge or abuse a cable operator in any market in which the programmers do not own an attributable interest in a different cable operator.

In fact, the legislative history demonstrates that Congress had exactly the opposite result in mind: that vertically integrated programmers would be subject to the Act's restrictions in all markets in which they operated. Congress was principally concerned with the market power amassed by vertically integrated programming vendors, and feared that these programmers were using that power to dominate the cable industry and choke off competition.[23] Artificially limiting the reach of section 628 to

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[23] See, e.g., 138 Cong. Rec. H6533-34 (daily ed. July 23, 1992) (Rep. Tauzin) (section 628 "requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs. . . . It is this simple. There are only five big cable integrated companies that control it all. [Section 628] says to those big five, 'You cannot refuse to deal anymore.' You will have to offer your programs to other competitors, and you cannot refuse to deal by saying, 'We will only give it to you at a much higher price.' Prices need to be comparable and fair."); 137 Cong. Rec. S592 (daily ed. Jan. 14, 1991) (Sen. Lieberman) ("The consumer is the ultimate victim of these anticompetitive activities. Would-be operators and competitors from other industries are locked out of the cable marketplace by the industry's abuse of concentrated ownership. In doing this, the cable industry is actively stifling competition through unfair business practices."); 137 Cong. Rec. S582 (daily ed. Jan. 14, 1991) (Sen. Danforth)

a few markets, and allowing vendors' anti-competitive practices to flourish elsewhere, is both unsupported by the statutory text and contrary to the congressional intent.

This point can be illustrated by hypothesizing an independent cable operator that competes in Market A with a TCI-owned system, and competes in Market B with a Time Warner-owned system. In that situation, the two vertically integrated programmers can provide reciprocal assistance to each other in competing with the independent. Time Warner can offer price discounts when it sells HBO to the TCI system in Market A; TCI can reciprocate by giving favorable terms for the Discovery Channel to the Time Warner system in Market B. Neither Time Warner nor TCI need engage in anti-competitive practices in selling programming in those markets where they actually operate cable systems. Rather, the chain of reciprocal dealing will ensure that they, in effect, give each other an unfair competitive advantage in the other market. For the independent cable operator, however, the result is profoundly negative.

Paragraph 15. Section 628(c)(2)(B) prohibits discrimination on the basis of either price or the "terms and conditions of sale

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("nondiscrimination provisions are essential to meaningful cable reform. Without access to popular programming, cable can keep programming locked up and prevent competition from developing."); cf. 138 Cong. Rec. S14224 (daily ed. Sept. 21, 1992) (Sen. Inouye) ("The conference report does not require cable programmers to give their programming away for free, or even to make it available at discount rates. It only requires that it be made available and that the price not be discriminatory.").